ZALIAH ZAKARIA

v.

STANDARD CHARTERED BANK MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN JC
[SUIT NO: D3-22-1628-2005]
13 FEBRUARY 2009

CIVIL PROCEDURE: *Pleadings - Amendment - Leave to amend statement of claim - Whether proposed amendments introduced new cause of action - Whether arose out of the same or substantially the same facts as cause of action already pleaded - Contracts Act 1950, s. 17 - Rules of the High Court 1980, O. 20 r. 5*

This was an appeal by the appellant against the decision of the learned senior assistant registrar refusing appellant leave to amend her statement of claim. Briefly, the appellant's claim against the defendant, Standard Chartered Bank Malaysia Berhad ("SCB') was for the sum of approximately 15 million, which loss she claimed arose from the fact that SCB had allegedly wrongly, illegally and without her authorization, on the instructions of one Ng Chee Khoon, debited large sums of monies from her various accounts and deposits with SCB. *Vide* the present application, the appellant sought to amend the statement of claim in the following manner (i) at para. 3, she sought to particularize the details of all the accounts she held with the defendant; (ii) at para. 4, she sought to add the words 'fraudulently' and 'negligently' to the original paragraph; (iii) the proposed para. 5 was proposed to be deleted; (iv) in the reliefs claimed at para. 12, the appellant sought to expand her original prayer for a full disclosure on all accounts held by SC in her name, by seeking orders for full accounts of all monies held by the appellant in her various accounts. The issues that arose in respect of the proposed amendments were (a) whether the proposed amendments introduced a new cause of action; (b) whether any applicable limitation period had expired as of the date of the hearing of these proposed amendments and (c) whether the new cause/s of action arose out of the same or substantially the same facts as a cause of action already pleaded.

A **Held (allowing the appeal in part):**

(1) The amendments proposed to be made to para. 3 of the statement of claim amounted to a particularization by the appellant of the accounts she maintained she held with SCB's
B Butterworth Branch at the material time. Such particularization did not have the effect of adding any new cause of action to the appellant's claim. Instead it served to clarify and detail the numerous accounts which appellant claimed she had with SCB at the time. Accordingly, leave to amend the statement of
C claim to allow the amendments in para. 3 should be granted. (paras 17)

(2) None of the facts alleged were consistent with, or support an allegation of fraud. On the contrary, the facts pleaded did not
D make any allegations of deliberate dishonesty as envisaged by s. 17 of the Contracts Act 1950. A claim based on allegations of unauthorized debiting or a claim for breach of a mandate, which involved unintentional wrongdoing, could not be said to arise from substantially the same facts as a claim based on
E allegations of fraud and dishonesty, which required as a material component, an element of intentional wrongdoing. There is a sharp dividing line which separates the latter category of cases relating to fraud and dishonesty, from those claiming unintentional wrongdoing. Therefore, the same or
F substantially the same facts could not support both a claim for wrongful or unauthorized debiting, as well as fraud. As such, the facts as pleaded while supporting a claim for breach of a mandate, could not and did not support a cause of action in fraud, and it followed that leave to amend to include the
G allegation and particulars of fraud in para. 4 should be refused. (paras 25 & 26)

(3) The plea of negligence and particulars sought to be incorporated appeared to expand and to explain the case already pleaded. SCB would not be prejudiced in any manner
H that could not be compensated by appropriate orders as to costs. In the circumstances, the justice of the case required that the amendment relating to negligence be allowed. It was evident from a perusal of the original claim and the proposed amendment relating to negligence that the amendment arose
I out of the same facts. The proposed amendment served to clarify and particularize the appellant's claim with greater precision and detail. This benefited both the appellant and

SCB in that it assisted in putting into perspective the true nature of the dispute or controversy between the parties. Not only that the proposed amendment relating to a new cause of action in negligence should be allowed, but any consequential relief arising therefrom should also be allowed. The amendment relating to negligence in para. 4 should be allowed, as it arose out of the same or substantially the same facts as those already pleaded. (paras 29, 30 & 34)

(4) The amendments in para. 12 were allowed as it amounted to a particularization of the relief originally sought and was an expansion of the original relief claimed. (para 35)

[Leave to amend para. 3, part of para. 4 relating to negligence only, paras. 5, 9 and 12 granted, while leave to amend para. 4 in relation to allegation of fraud disallowed.]

Case(s) referred to:

Hock Hua Bank Bhd. v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 ***(refd)***

Ketteman & Ors v. Hansel Properties Ltd & Ors [1987] AC 189 ***(refd)***

Letang v. Cooper [1964] 2 All ER 929 ***(refd)***

Paragon Finance plc v. DB Thakerar & Co (a firm) [1999]1 All ER 400 ***(refd)***

Skrine & Co v. MBF Capital Bhd & Anor And Other Appeals [1998] 3 CLJ 432 CA ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 17

Rules of the High Court 1980, O. 20 r. 5(2), (5)

For the plaintiff - Tan Sri Darshan Singh (Shivdev Singh with him); M/s Darshan, Syed, Amarjit & Partners

For the defendant - Jack Yow (RS Nathan with him); M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JC:

[1] This is an appeal by the appellant ('Zaliah') against the decision of the learned senior assistant registrar refusing Zaliah leave to amend her statement of claim.

A

Summary Of Original Claim

[2] In brief, Zaliah's original claim against the defendant, Standard Chartered Bank Malaysia Berhad ('SCB') is for the sum of approximately RM15 million, which loss she claims, arose from
B the fact that SCB had allegedly wrongly, illegally and without her authorization, on the instructions of one Ng Chee Khoon, debited large sums of monies from her various accounts and deposits with SCB.

[3] The statement of claim alleges that these withdrawals had
C taken place sometime between January 2000 and April 2001 when Zaliah was abroad, as a consequence of the said Ng Chee Khoon presenting letters purporting to bear Zaliah's signature, authorizing large withdrawals. Ng Chee Khoon was her lawyer at the material time. Apart from this, in her original claim, Zaliah also set out
D particulars of numerous unauthorized withdrawals made from some of her accounts between March and September 2000. Zaliah's original claim was filed in November 2005.

The Proposed Amendments

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[4] *Vide* the present application, Zaliah seeks to amend the statement of claim in the following manner:

(i) At para 3, she seeks to particularize the details of all the
F accounts she held with the defendant at its Butterworth Branch. As such, the proposed amendment provides details of her personal savings account, her joint savings account held with her daughter, twenty (20) retirement time fund ('RTF') accounts or deposits and their particulars, fifty three (53) flexi-
G time deposit accounts and the sum purportedly held in these deposits, as well as other flexi-time deposits, the particulars okf which she claims she no longer has. When the total amount of monies in these accounts and deposits is added up, it amounts to RM26 million. Zaliah has not particularized any
H dates in relation to these accounts and time deposits;

(ii) At para 4, Zaliah seeks to add the words 'fraudulently' and 'negligently' to the original paragraph. The net effect of these proposed additions is to allege fraud and negligence against SCB in addition to the original allegations of wrongful, illegal
I and unauthorized debiting on the part of SCB. In support of the proposed new allegations of fraud and negligence, Zaliah proposes to add particulars of such alleged fraud and negligence.

(iii) The original para 5 is proposed to be deleted. It contained particulars of unlawful withdrawals between March and September 2000. It is proposed to be replaced instead with the claim that Zaliah's accounts have been debited in total in the sum of RM26 million.

(iv) Finally in the reliefs claimed at para 12, Zaliah seeks to expand on her original prayer for a full disclosure on all accounts held by SCB in her name, by seeking orders for full accounts of all monies held by Zaliah in her various accounts. She also seeks a declaration that SCB account to Zaliah for the sum of RM26 million, with interest, as well as damages.

[5] The application to amend the statement of claim was made in April 2008 approximately two and a half years after the original claim had been filed. In the interim, Zaliah had made a previous attempt to amend the statement of claim in 2006 but it had been refused by the registrar and an appeal on that decision had previously been withdrawn.

[6] In her affidavit in support of the application to amend, Zaliah explains that her failure to fully and accurately particularize her claim was because she found when she returned from Dubai that most of her property, valuables and other possessions which she had left in her several places of residence were missing or had been removed from her home. Zaliah annexed several police reports that had been made at the time, which claimed that a great many valuable possessions had been stolen from her. Zaliah went on to explain that as such, she was unable to accurately surmise or particularize her claim fully at the time of filing. She thus explained the delay in making these amendments.

[7] Zaliah also annexed a voluminous number of documents encompassing a considerable portion of her entire banking history with SCB as exhibits in support of her application. It is evident from a perusal of these documents that:

(a) Zaliah did indeed have accounts with SCB at the material time, ie, between January 2000 and April 2001;

(b) The letters purporting to authorize withdrawals bearing Zaliah's signature which she alleges is a forgery are also annexed. They request that monies be forwarded to Ng Chee Khoon; they are undated;

(c) Zaliah has annexed copies of the Flexi-Time Deposits particularized in para 3(e) as exhibits.

Appellant's Submissions

[8] In support of Zaliah's application for leave to amend the statement of claim, her counsel, Mr. Shivdev and Tan Sri Darshan Singh maintained that in accordance with the principles set out in *Yamaha Motor Co. Ltd. v. Yamaha (M) Sdn. Bhd. & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, the amendments sought:

(i) Are *bona fide*;

(ii) Would not cause prejudice to SCB that cannot be compensated in costs; and

(iii) Do not turn the suit from one character into a suit of another and inconsistent character.

[9] It was contended that the amendments sought do not in fact introduce new pleas but merely explain or expand within permitted limits the case already pleaded previously. (See *Skrine & Co. v. MBF Capital & Anor & Other Appeals* [1998] 3 CLJ 432). Alternatively it was submitted that even if the proposed amendments had the effect of adding new causes of action in fraud and negligence to the claim, these amendments should be allowed in accordance with the provisions of O. 20 r. 5, in that the new causes of action arise out of the same facts or substantially the same facts as the causes of action already pleaded and in respect of which relief has already been claimed. (See *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126).

[10] Finally it was submitted that no prejudice was occasioned to SCB that could not be compensated in costs.

Respondent's Submissions

[11] Mr. Rabindranathan and Mr. Yow for SCB strenuously opposed the application for amendment in its entirety submitting *inter alia* that:

(i) The proposed amendments sought to introduce new causes of action, particularly fraud, which by virtue of O. 20 r. 5 could only be allowed if it arose out of the same facts or substantially the same facts. It was contended that a case of fraud or dishonesty on the part of SCB was not evident in the original pleadings and

could not simply be imputed to SCB without more, particularly where the allegations of fraud in the original pleading had been leveled against a third party. In short it was contended that an allegation of fraud or dishonesty on the part of SCB was very different from an allegation of breach of mandate or wrongful debiting, and it could not be said in those circumstances that the new cause of action in fraud was based on the same facts or substantially the same facts. (See *Paragon Finance plc v. DB Thakerar & Co. (a firm)* [1999]1 All ER 400).

[12] It was next submitted that the particulars pleaded were insufficient to ascribe fraud to SCB and inadequate to found a cause of action in fraud against the bank. There were no particulars to the effect that SCB was aware of, or participated in the preparation of the "fraudulent" letters purporting to authorize withdrawals from Zaliah's account.

[13] With respect to the proposed amendment to add negligence, counsel submitted that there were insufficient particulars of the relevant accounts involved and no dates given of the alleged wrongful debiting. These were facts which Zaliah could ascertain from statements in her possession but which she had failed to particularize. Additionally it was contended that SCB was unable to assess whether the claims in negligence were time-barred as the dates of the withdrawals had not been specified. However in relation to the deposit accounts, counsel maintained that SCB would be deprived of the defence of limitation.

[14] Finally it was contended that the amendments were sought after considerable delay and that the supporting affidavit filed by Zaliah was inadequate in that it failed to specify the new facts which had been discovered and their relevance to the claim. The mere placement of a voluminous quantity of documents without explaining them in the affidavit was inadequate. As a consequence it was contended, SCB would suffer prejudice if the amendments were allowed, in that the claim would be transformed after seven to eight years from a breach of mandate to one of fraud, which prejudice could not be compensated in costs.

The Issues

[15] The issues that arise in respect of the proposed amendments are:

A (i) Whether the proposed amendments introduce a new cause of action;

(ii) Whether any applicable limitation period has expired as of the date of the hearing of these proposed amendments;

B (iii) Whether the new cause/s of action arises out of the same or substantially the same facts as a cause of action already pleaded.

[16] I propose to deal with the amendments outlined above C under the following categories:

(a) Amendments which do not introduce a new cause of action;

(b) An amendment which introduce a new cause of action after the expiry of the limitation period but which the appellant D contends arises out of the same or substantially the same facts.

Category (a): Amendments Which Do Not Introduce A New Cause Of Action

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[17] The amendments proposed to be made to para 3 of the statement of claim amount to a particularization by Zaliah of the accounts she maintains she held with SCB's Butterworth Branch at the material time. The details of the various accounts held (as F outlined above) are set out in paras (a) to (f). Such particularization does not have the effect of adding any new cause of action to Zaliah's claim. Instead it serves to clarify and detail the numerous accounts which Zaliah claims she had with SCB at the time. Accordingly leave to amend the statement of claim to allow the G amendments in para 3 should be granted.

Category (B): Amendments Which Introduce A New Cause Of Action But Which The Appellants Contend Arise Out Of The Same Or Substantially The Same Facts – The Amendments Relating To Fraud

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[18] In para 4 of the statement of claim, Zaliah proposes to add allegations of both fraud and negligence against SCB. The allegation of fraud amounts to a proposal to introduce a new cause of action. It is not entirely clear whether any applicable I limitation period has expired, as the precise date of discovery of the alleged 'fraud' is not apparent. Therefore the date to which the limitation period is postponed is similarly not clear.

[19] In order to assess the effect of the proposed new cause of action it is necessary to consider the nature of the original claim first. The original para 4 contends that SCB wrongly, illegally and without due authorization debited Zaliah's accounts on the instructions of one Ng Chee Khoon. It is therefore evident that in order to establish this cause of action it is not necessary to prove any element of 'intent' on the part of SCB. In short, the original cause of action, while leveling wrongdoing at SCB, does not ascribe any element of intentional wrongdoing on its part. There is no requirement to prove any element of willful or intentional wrongdoing on the part of SCB for Zaliah to succeed in her original claim, as 'intent' does not comprise an element of the cause of action in the original claim.

[20] However the proposed amendment in para 4 *vis a vis* fraud seeks to introduce an element of intentional wrongdoing which was not present in the original claim. Fraud is a cause of action in which it is material to prove intent. (See s. 17 Contracts Act 1950). In *Paragon Finance v. D.B. Thakerar & Co.* (above), Millet LJ put it thus when deliberating on an application to amend a statement of claim to introduce *inter alia*, fraud:

> ... In my judgment, it is incontrovertible that an amendment to make a new allegation of intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action ... Paragraphs 10A and 15A(2) allege intentional breach of fiduciary duty. Breach of fiduciary duty was already pleaded but in terms which did not involve any conscious impropriety. The Appellants submit that the mere addition of an allegation of intent does not amount to a new cause of action. In my judgment this is contrary to the authorities already cited, which show that intentional and unintentional wrongdoing give rise to distinct causes of action.

[21] Earlier on in his judgment, the learned judge had referred to the case of *Letang v. Cooper* [1964] 2 All ER 929 @ 934, more particularly the definition offered by Diplock LJ of a cause of action:

> ... A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. ...

A The question in *Letang v. Cooper* was whether a claim for damages for personal injuries sustained as a result of the defendant's negligence was a claim for "damages for negligence' within the meaning of s. 2(1) of the Limitation Act 1939 as amended by s. 2 of the Law Reform (Limitation of Actions) Act 1954 even B though the claim was expressly pleaded in trespass. Diplock LJ held that where actual damage in the form of personal injuries has been sustained by the Appellant every factual situation which falls within the description of "trespass to the person" is, **where the trespass is unintentional,** equally aptly described as negligence' (my emphasis). His reasoning was (i) trespass to the person may C be intentional or unintentional; (ii) intent is therefore not one of the facts which is material to be proved to constitute the cause of action; (iii) accordingly unintentional trespass may be equally aptly described as negligence.

D But it is important to observe what Diplock LJ was **not** saying. He was **not** saying that trespass and negligence are the same cause of action or that intentional trespass could equally aptly be described as negligence, or that a cause of action in which it was material to prove intent could equally well be described by the name of a cause of action in which it was not. This would make E any distinction between different causes of action illusory and destroy the practical utility of the same concept ...

[22] In the instant case, in the original pleading there is no requirement for Zaliah to prove intentional wrongdoing on the part of SCB in order to prove her claim. In the proposed new F amendment to para 4 whereby 'fraud' is sought to be introduced, it will be material for Zaliah to prove an element of intentional wrongdoing. As a consequence it cannot be concluded that the amendment relating to fraud does not seek to introduce a new cause of action, but is only an expansion of an existing plea within G permitted limits. The proposed amendment to include fraud has the effect of seeking to introduce a new cause of action.

[23] On the assumption that the addition of a new cause of action in fraud on the facts of this case is made after any relevant H period of limitation has expired, the issue that then falls for consideration is whether, in accordance with O. 20 r. 5 sub-rule 5, the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party I applying for leave to make the amendment.

[24] While the proposed amendments do indeed reveal no further new facts to support the proposed plea of fraud, they are in themselves insufficient to attribute any element of intentional wrongdoing or impropriety on the part of SCB. In Paragon Finance (above) Millet LJ stated as follows with regards to an allegation of fraud:

> .... It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by other and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud even if the court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud.

[25] I respectfully agree and adopt the reasoning above. In the instant case none of the facts alleged are consistent with, or support an allegation of fraud. On the contrary, the facts pleaded do not make any allegations of deliberate dishonesty as envisaged by s. 17 of the Contracts Act 1950. A claim based on allegations of unauthorized debiting or a claim for breach of a mandate, which involves unintentional wrongdoing, cannot be said to arise from substantially the same facts as a claim based on allegations of fraud and dishonesty, which require as a material component, an element of intentional wrongdoing. There is a sharp dividing line which separates the latter category of cases relating to fraud and dishonesty, from those claiming unintentional wrongdoing. It therefore follows that the same or substantially the same facts cannot support both a claim for wrongful or unauthorized debiting, as well as fraud. The former envisages a claim based on unintentional wrongdoing while the latter envisages a claim which requires as a material component, an element of intentional wrongdoing.

[26] As such, the facts as pleaded while supporting a claim of a breach of mandate, cannot and do not support a cause of action in fraud, and it follows that leave to amend to include the allegation and particulars of fraud in para 4 should be refused. As stated by Millet LJ: "... As we have seen, a cause of action is defined by its factual ingredients, not by the name ascribed to it. As Juliet observed of the rose, its essential character is not dependent on the name by which it is called." In the absence of facts warranting a claim based on fraud and dishonesty, leave to amend should not be granted.

The Proposed Amendment Relating To Negligence – Amendments Which Introduce A New Cause Of Action After The Expiry Of The Limitation Period But Which The Appellant Contends Arises Out Of The Same Or Substantially The Same Facts

[27] The proposed amendments in para 4 relating to negligence fall within this category. As of the date of the hearing of this application, any applicable period of limitation current at the date of issue of the writ, has expired. This is because the dates of the breaches alleged against SCB arise at any time between January 2000 and April 2001 (see para 4 of the statement of claim). Accordingly O. 20 r. 5 sub-rule (2) and (5) prescribe the criteria to be satisfied when deciding on a proposed amendment of this nature. The overriding consideration in sub-rule 2 is that the court may grant leave if it thinks it just to do so. And sub-rule 5 prescribes that notwithstanding that the effect of the proposed amendment is to add a new cause of action, leave may be granted if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action.

[28] Does the proposed amendment relating to negligence serve to add a new cause of action? It can be said that the effect of the amendment is not to introduce any new plea but to explain or expand within permitted limits the case already pleaded by Zaliah. On this basis, respectfully relying upon the approach taken by Gopal Sri Ram JCA in *Skrine & Co. v. MBf Capital Bhd. & ANor & Other Appeals* [1998] 3 CLJ 432, I can do no better than reproduce His Lordship's adoption of the speeches of Lord Brandon in *Ketteman & Ors. v. Hansel Properties Ltd. & Ors.* [1987] AC 189:

> ... With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC O. 20 r. 5, in the Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can, I think, be summarized in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they has been made necessary by the honest fault or mistake of the party applying for leave to make them; it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however ate the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly there is no injustice to the other party if he can be compensated by appropriate orders as to costs ...

[29] In the instant case, the plea of negligence and particulars sought to be incorporated, appear to expand and explain the case already pleaded. SCB will not be prejudiced in any manner that cannot be compensated by appropriate orders as to costs. In the circumstances the justice of the case requires that the amendment relating to negligence be allowed.

[30] Even if I am wrong, and the proposed amendment does indeed introduce a new cause of action, sub-rule 5 allows such a new cause of action to be introduced provided it arises out of the same or substantially the same facts as the cause of action already pleaded. It is evident from a perusal of the original claim and the proposed amendment relating to negligence that the amendment arises out of the same facts. The proposed amendment serves to clarify and particularize Zaliah's claim with greater precision and detail. This benefits both Zaliah and SCB in that it assists in putting into perspective the true nature of the dispute or controversy between the parties.

[31] Counsel for SCB contended that the latter portion of sub-rule 5 in O. 20 r. 5, relating to 'relief ought to be read such that an amendment could only be allowed if no new relief was claimed. In the instant case, In so contending reliance was placed on the dissenting judgment of Seah SCJ in *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 where His Lordship held:

A ... In short, the Court may allow a new claim to be added only if the conditions specified in sub-rule (5) are satisfied and subject further to the overriding sub-rule (2) thereof. The conditions referred to in sub-rule (5) are the following:

B (a) In the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) That relief has already been claimed in the action by the party applying for leave to amend.

C The question I have to consider is whether the respondent had brought his case within this ambit Under the proposed amendments the respondent attempted to introduce two new causes of action based on (i) the tort of conversion (para. 8) and D (ii) for moneys had and received by the appellant to the respondent's use (see paragraph 9).

Consequential to these amendments the respondent will also amend the prayer by adding damages and exemplary damages, new relief which had not been claimed in the original action but E only came in after the amendment to the statement of claim ... Although the respondent had complied with condition (a) but he had failed to satisfy condition (b) of sub-rule (5). Since both the conditions specified in sub-rule (5) had not been satisfied by the respondent the learned judge should have dismissed the application.

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[32] In his dissenting judgment Seah SCJ held that a condition implicit in O. 20 r. 5 sub-rule 5 is that an amendment would only be allowed under this provision if the relief sought had already been claimed in the original action. If new relief were sought G which had not been claimed in the original statement of claim leave to amend should be refused because the said condition implicit in sub-rule 5 had not been adhered to.

[33] For my part I would most respectfully adopt the majority H decision in the same case by both Abdul Hamid Ag. LP and Syed Agil Barakbah, SCJ. Again I can do no better than with respect, rely on the construction of the said rule as expressed by Syed Agil Barakbah SCJ:

I ... The provision of paragraph (5) is clear and not ambiguous. It is therefore necessary to interpret the words in their plain and natural meaning in accord with the intention of the legislature, and should not however be extended beyond its natural and proper

limit. (See *Government of Malaysia v. Mohamed Amin bin Hassan*). My reading of paragraph (5) as emphasized is that it merely refers to a cause of action in the original pleading in which relief has already been claimed. It does not either expressly or by implication prevent any amendment by adding or substituting a new relief. In this particular case, to allow an amendment to only the cause of action without allowing a similar amendment to the new relief will not serve any purpose. A *fortiori* when the latter is incidental to the former. Relief means a remedy sought by a Appellant in an action ... Relief is part and parcel of a new cause of action and in fact ancillary to it. In my view it is just and proper for the Judge in the Court below to grant the respondents leave to amend the statement of claim after the expiration of the limitation period as provided in rule 5 paragraph (2) by allowing the addition of a new cause of action and also new reliefs that flow from it ...

[34] It therefore follows that not only that the proposed amendment relating to a new cause of action in negligence should be allowed, but that any consequential relief arising therefrom should also be allowed. For the reasons outlined above, it is just that the amendment relating to negligence in para 4 be allowed, as it arises out of the same or substantially the same facts as those already pleaded.

Amendments Relating To Relief Sought In Paragraph 12

[35] These amendments in para 12 are allowed for the following reasons:

(i) As explained by counsel for the appellant, the amendments in para 12 sub-paragraphs (d), (e) and (f) amount to a particularization of the relief originally sought in para (c). It is an expansion of the original relief claimed;

(ii) Sub-paragraphs (f), (g), (h) and (i) comprise consequential relief arising from the addition of the new cause of action in negligence as well as a computation of the total loss allegedly suffered by the appellant.

[36] In summary, I conclude that leave to amend paras 3, that part of para 4 relating to negligence only, paras 5, 9 and 12 is granted, while leave to amend to para 4 in relation to the allegation of fraud is disallowed. Accordingly, the appeal is allowed in part as stated and the appellant is to bear the costs of the amendment.